Construction Erectors, Inc. *and* International Association of Bridge, Structural and Ornamental Iron Workers, Local 625, AFL–CIO.[1] Case 37–CA–1528

December 10, 1982

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND JENKINS

On September 26, 1980, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[2] adopting the Administrative Law Judge's finding that Respondent Construction Erectors, Inc., violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, by failing and refusing since on or about February 28, 1979, to bargain collectively with the Union, repudiating the collective-bargaining agreement executed by Respondent and the Union on December 10, 1977, and withdrawing recognition from the Union as the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit. In so finding, the Board ruled that the Union had achieved majority status in a stable unit of Respondent's employees on December 10, 1977, when Respondent and the Union executed a multisite collective-bargaining agreement that Respondent unlawfully repudiated on February 28, 1979. The Board ordered Respondent to cease and desist from the conduct found unlawful and to take certain affirmative action designed to effectuate the policies of the Act. Thereafter, Respondent filed a petition for review of said Order and the Board filed a cross-application for enforcement with the United States Court of Appeals for the Ninth Circuit.

On November 16, 1981, a panel of the court of appeals issued its decision,[3] vacating the Board's Order and remanding the case to the Board for further proceedings. In its decision, the court determined that "there was not substantial evidence to support the Board's finding that there was a permanent and stable work force at the time of the [December 10, 1977] agreement between the Union [and Respondent]."[4] The court, therefore, remanded the case to the Board to determine whether "at some time prior to the [February 28, 1979] repudiation of the 1977 agreement, the workforce in the bargaining unit had become permanent and stable and the Union obtained majority support within the unit at that time."[5]

Thereafter, the Board informed the parties that they were entitled to file statements of position on the issue remanded to the Board. Counsel for the General Counsel, Respondent,[6] and the Union[7] filed statements of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board, having accepted the remand, respectfully recognizes the court's decision as binding for the purposes of deciding this case.

As noted above, the threshold issue to be decided is whether Respondent employed a permanent and stable work force of ironworkers. If it did, and the Union can demonstrate that it enjoyed majority support within the permanent and stable work force, then the December 10, 1977, contract between Respondent and the Union would constitute a collective-bargaining agreement within the meaning of Section 9(a) and Respondent's repudiation of that agreement and other related actions would be violations of Section 8(a)(5).[8] Conversely, if Respondent did not employ a permanent and stable work force, a Section 9(a) relationship would arise between Respondent and the Union only upon a showing that the Union enjoyed majority support of Respondent's employees on a site-by-site basis. Accordingly, in the absence of a permanent and stable work force, Respondent's repudiation of the collective-bargaining agreement would be lawful inasmuch as it employed no unit employees at the time of the repudiation and a union cannot demonstrate majority status at a time when the employer has no unit employees.[9]

[1] Hereinafter referred to as the Union.
[2] 252 NLRB 319.
[3] 661 F.2d 801 (9th Cir. 1981).
[4] *Id.* at 804.
[5] *Id.* at 805. In the event that Respondent did not employ a permanent and stable work force in which the Union enjoyed majority support prior to the February 28, 1979, repudiation, Respondent's repudiation and refusal to bargain would be lawful inasmuch as it employed no unit employees at the time of the repudiation. See *Dee Cee Floor Covering, Inc. and its alter ego and/or successor, Dagin-Akrab Floor Covering, Inc.*, 232 NLRB 421 (1977).
[6] Respondent filed a statement informing the Board that it had filed a voluntary petition under Chapter 7 of the Bankruptcy Code and that Respondent is currently a defunct business enterprise. As we have stated in previous cases, "It is well settled that mere discontinuance in business does not render moot issues of unfair labor practices alleged against a respondent." *Armitage Sand and Gravel, Inc.*, 203 NLRB 162, 166 (1973), enfd. in part 495 F.2d 759 (6th Cir. 1974); *The East Dayton Tool and Die Co.*, 239 NLRB 141, fn. 1 (1978). See also *Southport Petroleum Company* v. *N.L.R.B.*, 315 U.S. 100 (1942).
[7] The Union requests that the case be remanded to the Administrative Law Judge for additional findings of fact. Because we find the record to be sufficient on the issues before us, we find no basis for a remand to the Administrative Law Judge and the Union's request is hereby denied.
[8] *Precision Striping, Inc.*, 245 NLRB 169 (1979).
[9] *Giordano Construction Co., Employer-Petitioner*, 256 NLRB 47 (1981). See, generally, *Hageman Underground Construction, et al.*, 253 NLRB 60 (1980).

At the outset, we believe it is important to emphasize that the determination of whether a work force is "permanent and stable" is more than a mechanical exercise in tabulating the makeup, longevity, and fluctuation of a group of employees. For in making the determination, the Board ultimately is deciding whether the work force is of such a nature that a showing of majority support made at a particular point in time reasonably can be said to have significance at a subsequent time. In this regard, we do not require a showing that the work force is a stable group of employees who work for a long period of time with no fluctuation in the overall unit. Indeed, in view of the special nature of the construction industry,[10] such a requirement would virtually eliminate the possibility of finding a construction industry work force that is "permanent and static." In fact, a literal reading of "permanent and stable" would not even be workable in traditional Section 9(a) relationships where unit fluctuation and employee turnover are recognized as industrial facts of life. In short, our analysis in cases of this nature must go beyond the calculation of numbers and dates and focus upon the issue of whether the employee complement possesses sufficient continuity as to merit continued reliance on showing of majority support for the union made at any point during the relevant period.[11]

The record before us contains a myriad of exhibits including payroll records, referral lists, charts, and graphs. Although certain minor deviations exist, the parameters of Respondent's employee work records are clear. Thus, a combination of union referral and payroll records reveals that from January through November 1978,[12] 44 ironworkers were referred to Respondent by the Union.[13] In addition, the record shows three[14] employees employed by Respondent who were not referred by the Union, raising the total number of ironworkers employed by Respondent during 1978 to approximately 47.

Viewed on a monthly basis,[15] Respondent's complement of ironworkers ranged from a low of 5 in March to highs of 27, 24, and 30 during the months of January, May, and June, respectively. In all other months, the employee complement ranged from 9 to 18. The record also demonstrates that Respondent moved its ironworkers from job to job and did not assign them on a strictly project-by-project basis.

In analyzing the work records of the 47 individual ironworkers, we find that Respondent utilized 15 employees on a regular basis when viewed in terms of the months during which an employee worked.[16] Each of these 15 employees worked during 7 or more of the 11 months from January through November. Of the remaining employees, 12 worked during only 1 month, 12 worked during only 2 months, 3 employees worked during 3 months, 3 during 4 months, and 2 employees worked during 5 of the 11 months.

Focusing on the 15 employees who worked during 7 or more months, the record shows that these 15 individuals worked approximately three-quarters of the total number of days on which ironworkers were employed. The remaining working days were dispersed among the remaining 32 employees over the 11-month period, with a substantial majority of the remaining working days being during the months of January, May, and June.[17] Thus, with the exception of January, May, and June,[18] Respondent employed a basic core group[19] of ironworkers throughout 1978 that performed a substantial majority of the work undertaken by Respondent.

Based on the foregoing, we conclude that Respondent employed a permanent and stable work

[10] An essential predicate for Sec. 8(f) itself is the fact that the construction industry is characterized by higher than normal employee turnover, short-term employment, and unit fluctuation. This fact also requires such special rules as the particular voter eligibility standards applied to construction industry workers. See *Daniel Construction Company, Inc.*, 133 NLRB 264 (1961).

[11] The relevant period for a meaningful showing of majority support is normally within the effective term of the applicable collective-bargaining agreement.

[12] For ease of reference this period will be referred to as 1978, although the month of December is not included in the calculations inasmuch as the employees engaged in a strike lasting from November 1978 to January 15, 1979.

[13] The court of appeals correctly noted that 62 names were contained on the union referral list. The list, however, contains several duplications and triplications of names.

[14] One of these, Proctor, is not listed in the union referrals or the individual payroll records. He is listed, however, on a cumulative work record submitted by Respondent.

[15] Much of the comparative analysis undertaken herein is in terms of monthly employment. While such a criterion may not be appropriate in all cases, we find here that, with only minimal deviations, an employee who worked during any given month worked during either all or a substantial portion of that month.

[16] Seven employees, Coloborg, Hamabata, Raymon, Rodriquez, Kamai, Proctor, and Raphael Kim worked during 7 of the 11 months in issue. Four employees, Russell Kim, Mikami, Nacario, and Nipu worked during 8 months. Employee Nomura worked during 9 months, employee Corniel worked during 10 months, and employees Gallarde and Hemo worked during all 11 months.

[17] The 32 employees who worked during 5 or fewer months represent a cumulative total of 67 months. Out of the total of 67, 47 of the months represent work in January, May, and June. Eleven of the 12 employees who worked during just 1 month worked during 1 of these 3 months and 18 of the 24 total months worked by employees who worked during 2 months were either January, May, or June.

[18] In March, Respondent employed only 6 ironworkers, with 4 being from the core group of 15.

[19] There was, of course, some fluctuation in the core group when viewed on a month-by-month basis. Thus, the core group fluctuated from a low of 4 in March to a high of 14 during June and July. During April through November, however, the core group numbers ranged only from 9 to 14.

force during 1978.[20] In reaching this conclusion, we rely particularly on the fact that throughout the relevant period, Respondent moved its employees from job to job and did not regularly assign employees to single jobs and then to no subsequent jobs. Thus, the instant case is readily distinguishable from those where employees are hired on a jobsite-by-jobsite basis with little or no carryover from job to job.[21] In addition, we also find of substantial significance the existence of a basic core group of employees utilized by Respondent throughout the relevant period. As noted, this group of employees worked approximately 75 percent of the total number of days on which ironworkers were employed and, again, moved from job to job. Concededly, there were several periods in the first half of 1978 when the exigencies of available work caused some fluctuation. The significant fact remains, however, that Respondent's work force was characterized, for the most part, by extensive employee carryover and relative consistency in the identity of the individuals being employed at any given time. This is particularly true when one examines the months from July through November.[22] Accordingly, we conclude that Respondent's work force possessed sufficient continuity as to merit continued reliance on a demonstration of majority support for the Union made at any point during the relevant contract period. In short, Respondent employed a permanent and stable work force.

Having found that Respondent employed a permanent and stable work force, the next issue is whether the Union has demonstrated that it enjoyed majority support among the unit employees at any point prior to Respondent's repudiation of the contract. On this issue, there is little, if any, basis for meaningful disagreement. Thus, it is clear that the vast majority of ironworkers utilized by Respondent were union members referred to Respondent through the Union's hiring hall. Indeed, out of the total of 47 ironworkers employed during 1978, no more than 12 were nonunion. In addition, an examination of the various groups of employees broken down on the basis of numbers of months worked also reveals a substantial majority support for the Union. Thus, in the core group of 15 employees, 10 were union members. Even in the group of 12 employees who only worked during 1 month, the Union enjoyed an 8-to-4 majority. In short, it appears that in any meaningful grouping of employees, the Union at all times enjoyed substantial majority support.

In view of our findings above, we conclude that the agreement between the Union and Respondent executed by the parties on December 10, 1977, ripened into a collective-bargaining agreement within the meaning of Section 9(a) of the Act during 1978. Accordingly, by the following conduct Respondent violated Section 8(a)(5) of the Act: failing and refusing since on or about February 28, 1979, to bargain collectively with the Union; repudiating the collective-bargaining agreement executed by Respondent and the Union on December 10, 1977; withdrawing recognition from the Union as the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit. The appropriate remedy for the foregoing violations is fully set forth in the Administrative Law Judge's Decision that accompanied our September 26, 1980, Decision and Order in this proceeding and we shall order Respondent to take the action set forth therein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as adopted by the National Labor Relations Board's Decision and Order at 252 NLRB 319 (1980), and hereby orders that the Respondent, Construction Erectors, Inc., Honolulu, Hawaii, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order as adopted.

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[20] In the instant case, it is not incumbent upon us to specify the exact point in time at which the work force became permanent and stable, so long as it is clear that such status arose prior to the February 28, 1979, contract repudiation. Indeed, because an analysis of this sort must look at long-term employment trends and the longevity and regularity of individual workers, it is doubtful whether in many individual cases an exact date can be ascribed to the time when a work force becomes "permanent and stable." Here, we would be reluctant to say that such status arose in January, February, or March where the overall work force ranged from 6 to 33 and the core group from 7 to 4. A definite pattern of continuity does begin to appear in April where the core group reaches 11, moves to 14 in June and July, and moves slowly downward to 9 in November. This pattern becomes substantially clearer after June, as the overall complement of employees for July through November is 20, 12, 15, 11, and 10, while the core group numbers for those months are 14, 12, 12, 11, and 9. At the time of the strike in November 1978, Respondent employed six ironworkers, all of whom were part of the core group.

[21] See *Dee Cee Floor Covering, Inc. and its alter ego and/or successor, Dagin-Akrab Floor Covering, Inc.*, 232 NLRB 421 (1977); *Giordano Construction Co.*, 256 NLRB 47 (1981). As noted above, there are few hard and fast rules of universal application in determining the nature of a construction industry work force. We do note, however, that one consistent and usually reliable criterion is whether there is a consistent pattern of employee carryover from job to job.

[22] It bears emphasis here that it would be totally unrealistic for this Board to require uniform consistency in overall work force numbers and employee identity. Indeed, such consistency is rare in any employment context. To require it in the construction industry would be to establish a standard that would probably never be met.